

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 22, 2007

STATE OF TENNESSEE v. JOHN PAYNE RUSSELL

Appeal from the Circuit Court for Blount County
No. C-14396 D. Kelly Thomas, Jr., Judge

No. E2006-01611-CCA-R3-CD - Filed August 23, 2007

The defendant, John Payne Russell,¹ pleaded guilty in Blount County Circuit Court to aggravated assault, *see* T.C.A. § 39-13-102 (2006), and aggravated burglary, *see id.* § 39-14-403, on September 8, 2003. He received a three-year, suspended sentence for each count to run concurrently, and as a condition of his plea agreement, he was to complete the Steps program. On October 31, 2003, a violation of probation warrant was filed because the defendant was arrested for public intoxication, *see id.* § 39-17-310, and he failed to complete the Steps program. The court ordered the defendant to serve 90 days in jail and then to return to probation. After serving jail time, the defendant enrolled in and completed an eight-month in-patient drug treatment program, House of Hope in Indiana. He then returned to supervised probation, and another probation violation warrant was filed July 18, 2006 and alleged that the defendant had used illegal drugs, missed appointments, and failed to pay probation fees and court costs. After an evidentiary hearing on July 31, 2006, the trial court revoked the defendant's probation and ordered him to serve his sentence in confinement. The defendant appeals the revocation, and we affirm the trial court's order.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ALAN E. GLENN, JJ., joined.

Mack Garner, District Public Defender (at trial); and J. Liddell Kirk, Knoxville, Tennessee (on appeal), for the Appellant, John Payne Russell.

Robert E. Cooper, Jr., Attorney General & Reporter, Jennifer L. Bledsoe, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Tammy Harrington, Assistant District Attorney General, for the Appellee, State of Tennessee.

¹The indictment lists the defendant's name as "John Payne Russell"; however, the transcript of the revocation and all documents on appeal list his name as "Jonathan P. Russell." We will use the spelling as listed in the indictment.

OPINION

At the revocation hearing, the defendant's probation officer, Roger Montgomery, testified that the defendant served 90 days and stayed at the House of Hope drug treatment center for 237 days, completing program phase one, but the defendant left the center against the center's advise. Upon returning to Tennessee, the defendant worked for a barge towing service. In January 2006, the defendant lost this job because he failed the company's drug test, although the defendant first told Mr. Montgomery he quit this job. The defendant then got a job as a maintenance worker for Westside Apartments, which his mother owned.

Mr. Montgomery testified that the defendant started missing appointments from March to June 2006, sometimes rescheduling and sometimes he would even miss the rescheduled appointments. Mr. Montgomery testified that the defendant had neither paid probation fees nor court costs. He also testified that the defendant came to his scheduled appointment on June 2, 2006. When Mr. Montgomery told the defendant that he was to take a drug test that day, the defendant stated that there was no need for the test because he would test positive for cocaine.

Mr. Montgomery told the defendant that he would inform the court and that the defendant should seek treatment. He instructed the defendant to return to the probation office on June 16 with a drug treatment plan. On June 16, the defendant called Mr. Montgomery and told him that he could not make the appointment due to a flat tire. They rescheduled for July 27, but the defendant missed that appointment as well.

The defendant testified he was 34, divorced, and had four children by four different mothers. He paid approximately \$800 a month in total child support, and as of the time of the hearing, he was current on his payments. He further testified that he had a drug problem, and he lost his job with the barge towing service because he smoked marijuana. After his father died in April and he separated again from his ex-wife, he started using cocaine. The defendant missed his probation appointments because he was afraid of receiving a violation warrant. However, during this time, he maintained steady employment.

The defendant testified that he arranged in-patient drug treatment for himself at a drug treatment facility in Chattanooga, Tennessee, and he would attend this treatment if he remained on supervised probation and attend "AA meetings" after the treatment. He further testified that his treatment would work this time because one of his children had recently come back into his life.

The trial court found that the defendant violated probation by using controlled substances and failing to report to his probation appointments. The court stated that because of his extensive drug usage in the past, his likelihood of successfully completing probation was poor. Thus, the court revoked the defendant's probation and ordered him to serve his sentence.

The defendant filed a timely notice of appeal, challenging the revocation.

The standard of review upon appeal of an order revoking probation is the abuse of discretion standard. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). For an abuse of discretion to occur, the reviewing court must find that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the terms of probation has occurred. *Id.*; *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The trial court is required only to find that the violation of probation occurred by a preponderance of the evidence. T.C.A. § 40-35-311(e) (2006). Upon finding a violation, the trial court is vested with the statutory authority to “revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered.” *Id.* Furthermore, when probation is revoked, “the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of the suspension.” *Id.* § 40-35-310. The trial judge retains the discretionary authority to order the defendant to serve the original sentence. *See State v. Duke*, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995).

Having considered the defendant’s arguments, we are unpersuaded. It must be remembered, of course, that the standard of proof in a probation revocation proceeding is that of preponderance of the evidence. T.C.A. § 40-35-311(e). Thus, the level of proof necessary to sustain a probation violation allegation is considerably less than the beyond-a-reasonable-doubt standard applicable to conviction proceedings. In this regard, the State presented a preponderance of proof that the defendant violated his probationary terms.

As the trial court found, the defendant admitted to using marijuana and cocaine, both controlled substances, while on probation. The court also found that the defendant missed his mandatory probation appointments. In addition, the defendant failed to pay court costs and probation fees. We hold that the trial court did not abuse its discretion in revoking the defendant’s probation and ordering him to serve his sentence in confinement. *See Larry W. Timberlake v. State*, No. M2004-02734-CCA-R3-CD, slip op. at 2 (Tenn. Crim. App., Nashville, Sept. 12, 2005) (upholding probation revocation where “defendant admitted that he failed to report to his probation officer, failed to advise his probation officer of his new address, and used illegal drugs while on supervised probation, all of which were in contravention of his probation agreement”).

JAMES CURWOOD WITT, JR., JUDGE